Supreme Court, U.S.
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No. 99-16

In The

Supreme Court of the United States

RAMONA S. BURNETTE,

Petitioner,

v.

TOM BROADHEAD/SIGNET/CAPITAL ONE BANK/FIRST UNION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Respondents Capital One Bank ("Capital One") and Tom A. Broadhead ("Broadhead") submit that there are no questions properly presented for review. Insofar as Petitioner has attempted to set out questions for the Court, they are properly stated as follows:

(1) If the Bankruptcy Code provides a cause of action against a private employer for failure to hire a person based on bankruptcy status, what is the applicable statute of limitations?

(2) Whether the anti-discrimination provisions of the Bankruptcy Code applicable to private employers provide applicants with a cause of action for failure to hire based on bankruptcy status?

CORPORATE DISCLOSURE STATEMENT

In accordance with Rule 29.6 of the Rules of the Supreme Court of the United States, Capital One states that it is a wholly-owned subsidiary of Capital One Financial Corporation, a publicly held corporation.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Capital One and Tom A. Broadhead, by counsel, respectfully submit that Burnette's Petition for Writ of Certiorari should be denied, and the Court should decline to review this case.

OPINIONS BELOW

The July 20, 1998 opinion and order of the United States District Court for the Eastern District of Virginia and the February 3, 1999 *per curiam* opinion of United States Court of Appeals for the Fourth Circuit are set forth in the Appendix to Burnette's Petition for Writ of Certiorari.

JURISDICTION

This Court has jurisdiction based on 28 U.S.C. § 1331 and 11 U.S.C. § 525(b).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

11 U.S.C. § 525 (1998):

> (a) Except as provided . . . , a governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant

against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act, or another person with whom such bankrupt or debtor has been associated, solely because such bankrupt or debtor is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the commencement of the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act.

(b) No private employer may terminate the employment of, or discriminate with respect to employment against an individual who is or has been a debtor under this title, a debtor or bankrupt under the Bankruptcy Act, or an individual associated with such debtor or bankrupt, solely because such debtor or bankrupt –

(1) is or has been a debtor under this title or a debtor or bankrupt under the Bankruptcy Act;

(2) has been insolvent before the commencement of this case under this title or during the case but before the grant or denial of a discharge; or

(3) has not paid a debt that is dischargeable in a case under this title or that was discharged under the Bankruptcy Act.

28 U.S.C. § 1658 (1998):

Except as otherwise provided by law, a civil action arising under an Act of Congress enacted

> after the date of the enactment of this section [December 1, 1990] may not be commenced later than four years after the cause of action accrues.
>
> Va. Code Ann. § 8.01-248 (1995):
>
> Every personal action accruing on or after July 1, 1995, for which no limitation is otherwise prescribed, shall be brought within two years after the right to bring such action has accrued.
>
> Va. Code Ann. § 8.01-248 (1984):
>
> Every personal action, for which no limitation is otherwise prescribed, shall be brought within one year after the right to bring such action has accrued.

STATEMENT OF THE CASE

As Appellant Ramona S. Burnette's ("Burnette") Petition fails to set forth the facts clearly and cogently, Capital One will provide the Court with the relevant facts. For the purposes of Capital One's motions below, the district court assumed the following facts alleged by Burnette to be true.

Burnette contends that she applied for employment with Signet Bank, the corporate precursor to Capital One, as a Data Entry Operator on November 12, 1993 and again on June 16, 1994. In November 1993, Burnette responded to an advertisement in *The Richmond Times-Dispatch* placed by Signet Bank and seeking Data Entry Operators in the Richmond area. The notice did not indicate the minimum number of keystrokes required per minute. Burnette submitted an application and spoke with ~~Linda~~ Roberts, a representative of Signet Bank. As a

part of the application process, Signet Bank obtained Burnette's credit report. The report indicated that she owed $379.00 to the McGuire Clinic, a hospital, or to Virginia Physicians, a medical practice. It also revealed that Burnette was under Chapter 7 bankruptcy. Roberts told Burnette that an outstanding balance did not favor employment, and she encouraged her to pay the debt. She further communicated to Burnette the bank's reservations in hiring a person who was under bankruptcy. Burnette was not employed.

Burnette applied for the same position in June 1994. She spoke with Matthew E. Allen, III of Signet Bank on this occasion. Allen again reviewed her credit history and tested her competency as a Data Entry Operator. The bankruptcy remained on the credit report, and Signet declined to offer her employment.

During the summer of 1994, Burnette obtained employment at Kelly Temporary Services as a Data Entry Operator. She was subsequently assigned to work at Signet Bank's corporate headquarters in Glen Allen, Virginia. Burnette believes that as a result of her previous unsuccessful applications, Signet's human resources department was aware of her credit history and terminated her temporary position at some point during the summer of 1994.

Some time in 1995, Burnette retained Alan Banov, Esquire, of Washington, D.C., to represent her in connection with Signet Bank's earlier refusals to grant her employment. Banov wrote to Signet Bank's Director of Human Resources, Nathan Taylor, on May 16, 1995. The letter contended that Signet's failure to hire Burnette

violated 11 U.S.C. § 525(b). The letter was forwarded for response to Tom A. Broadhead, corporate counsel for Capital One Bank, the newly-formed independent entity that had formerly been Signet Bank's credit card division.

Broadhead investigated Burnette's allegations and responded by letter on June 29, 1995. Broadhead explained that while Burnette listed her key punch skills as 15,924 strokes per hour, she actually tested at a rate of 10,180 strokes per hour. He further commented that the bank was looking for a standard score of 15,000 key strokes per hour. Additionally, Broadhead commented that because her skills were not as strong as others and there was a question about her delinquency, the bank decided to choose another candidate.

Nothing more was heard from Burnette until she filed a Complaint, *pro se*, in the United States District Court for the Eastern District of Virginia on November 17, 1997. She filed a second Complaint on June 16, 1998. Although the first Complaint was never properly served, Capital One agreed to accept service, and it filed a Motion to Dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure on April 24, 1998. The district court consolidated Burnette's cases and granted Capital One's Motion to Dismiss, with prejudice, on July 20, 1998. It dismissed both Complaints as to both Capital One and Signet Bank. By a *per curiam* opinion, the United States Court of Appeals for the Fourth Circuit affirmed the decision of the district court on February 3, 1999. Burnette then filed a Petition for Rehearing and Rehearing en Banc, which was denied by Order of March 15, 1999. Burnette appealed to this Court for an extension

of time in which to file her Petition for Certiorari. That extension was granted and Burnette filed her Petition on June 28, 1999.

ARGUMENT

I. Burnette's Claims are Barred by the Applicable Statute of Limitations

Burnette's Petition has failed to present the issues in a clear and brief manner, and for that reason, the Court may dismiss the Petition. *See* Sup. Ct. R. 14.4. One fact, however, is abundantly clear and militates in favor of dismissal: Burnette's claims are barred by the applicable statute of limitations. Under 28 U.S.C. § 1658 (1998), an Act of Congress enacted after December 1, 1990 which does not contain a statute of limitations period falls under the "catch-all" limitations period of four years. Contrary to Burnette's assertions, for federal statutes enacted prior to December 1, 1990, courts must "borrow" the most analogous state limitations period. *See North Star Steel Co. v. Thomas*, 515 U.S. 29, 33-34 (1995) (noting that borrowing applicable state statutes of limitations in the absence of federal direction is longstanding and settled).

The anti-discrimination provisions of the Bankruptcy Act at issue here were enacted well before December 1, 1990, and they do not contain a limitations period. Therefore, the Court must apply the most closely analogous Virginia limitations period. While Virginia law does not recognize a cause of action for bankruptcy discrimination, wrongful discharge from employment is recognized

in Virginia. State and federal courts applying Virginia law have applied the "catch-all" limitations period found in Va. Code Ann. § 8.01-248 (Michie 1995) to claims for wrongful discharge. *See Sutter v. First Union Nat'l Bank of Va., Inc.*, 1996 U.S. Dist. LEXIS 10985, at *11 (E.D. Va. July 22, 1996) (applying the "catch-all" period to claims for wrongful termination under § 510 of ERISA); *Purcell v. Tidewater Construction Corp.*, 458 S.E.2d 291 (Va. 1995) (applying "catch-all" period to employment claims). Currently, the period prescribed by this section is two years. Under a former version of the statute effective in 1993 and 1994, the limitations period for actions accruing before July 1, 1995 was one year. *See* Va. Code Ann. § 8.01-248 (Michie 1984).

Burnette was denied employment by Signet Bank on November 12, 1993 and again on June 16, 1994. She also claims that Signet had her temporary assignment and position with Kelly Services terminated in the summer of 1994. Her causes of action for bankruptcy discrimination, if they accrued at all, accrued on those dates and by the end of the summer of 1994. Because the four-year statute of limitations found in 28 U.S.C. § 1658 by its own terms does not apply, the one-year limitations period found in the former Va. Code Ann. § 8.01-248 must apply. Therefore, even if Burnette had cognizable claims for failure to hire because of bankruptcy, they expired on November 14, 1994 and June 16, 1995, respectively. Further, if she had a claim for bankruptcy discrimination based on her allegation that Signet had her temporary position with Kelly Services terminated, that cause of action expired during the summer of 1995.

II. Burnette's Claims are not Cognizable Under 11 U.S.C. § 525(b)

Several district courts have considered whether a cause of action for failure to hire based on bankruptcy status will lie against a private employer, but no circuit other than the Fourth Circuit in this case, has addressed this narrow question. Only the Ninth Circuit has written an opinion examining the broader question of whether an employer-employee relationship is necessary to assert a claim of discrimination against a private employer based on bankruptcy status.

In *Comeaux v. Brown & Williamson Tobacco Co.*, the Ninth Circuit applied section 525(b), without a discussion of its applicability, to a private employer who declined to employ the plaintiff after it had offered, and the plaintiff had accepted the offer of full-time employment. *See Comeaux*, 915 F.2d 1264, 1268-69 (9th Cir. 1990); *see also In re Hopkins*, 81 B. R. 491 (Bankr. W.D. Ark. 1987) (same). The *Comeaux* court concluded summary judgment for the company was appropriate because the bankruptcy was not the sole factor causing the company to renege on its offer of employment. *See Comeaux*, 915 F.2d at 1269.

Consequently, Capital One submits that it is premature for the Court to grant a Writ of Certiorari to settle the issue. Insofar as the Court finds the issue to be ripe for review in this case, Capital One argues that the Court should follow the reasoning of the majority of district courts and conclude that no such cause of action is available to Burnette.

Even if Burnette's claims were timely filed, they must fail because 11 U.S.C. § 525(b) does not provide a cause of

action against a private employer for the failure to hire a person on account of bankruptcy status. Unlike the language contained in 11 U.S.C. § 525(a) which applies to the government, Congress did not include a provision in section 525(b) which proscribes a private employer from "deny[ing] employment to" a bankrupt or debtor. *See* 11 U.S.C. § 525(b). It is a well-accepted tenet of statutory construction that " 'Congress acts intentionally and purposely in the disparate inclusion or exclusion' " of specific statutory language. *See Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)). Where Congress has left out a statutory phrase, it is the Court's duty to refrain from reading it into the statute. *See Keene Corp. v. United States*, 508 U.S. 200, 208 (1993).

The legislative history of 11 U.S.C. § 525(b), is unfortunately sparse and does not address the question at issue in this case. *See* John C. Chobot, *Anti-Discrimination Under the Bankruptcy Laws*, 60 Am. Bankr. L. J. 185, 197 (1986). Several district courts, however, have considered the text of 11 U.S.C. § 525(b) and determined that the correct reading of the statute requires the debtor to stand in an employee-employer relationship with the defendant. *See, e.g., In re Hardy*, 209 B. R. 371 (E.D. Va. 1997). In *Fiorani v. CACI*, 192 B. R. 401 (E.D. Va. 1996), the court specifically considered the effect of the phrase "with respect to employment" in light of the absence of the phrase "deny employment to" in section 525(b). The court concluded that the proper reading of the phase "with respect to employment" is one to cover neither hiring nor firing, but other terms and conditions of employment. If "with respect to employment" were meant to include

hiring and firing it would not have been necessary for Congress to include "termination" in the statute. *See Pastore v. Medford Sav. Bank*, 186 B. R. 553, 554-55 (D. Mass. 1995); *Fiorani*, 192 B. R. at 404-05. The general reference to employment in section 525(b), therefore, is not properly read to include hiring.

An examination of the chronology of congressional action with respect to 11 U.S.C. § 525 fully supports the conclusion that Congress deliberately chose not to prohibit the denial of employment on the basis of bankruptcy. Congress enacted section 525(a) in 1978, and it enacted section 525(b) in 1984. Congress therefore, in enacting section 525(b), was aware of the language contained in the section applicable to government entities and specifically declined to include "deny employment to" in the section applicable to private employers. *See Fiorani*, 192 B. R. at 405. Where Congress omits language in one section but includes it in another section of the same Act, it is presumed to act with a purpose. *See, e.g., Russello*, 464 U.S. at 23; *Middlesex City Sewage Auth. v. Sea Clammers*, 453 U.S. 1, 14-15 (1981). This rule is particularly appropriate when considering a comprehensive statutory scheme such as the Bankruptcy Act. *See, e.g., Lynch v. Johns-Manville Sales Corp.*, 710 F.2d 1194, 1197-98 (6th Cir. 1983) (calling the Bankruptcy Act a "detailed and calculated statutory scheme particularly appropriate for *in pari materia* construction").

Thus, elementary rules of statutory construction and a textual analysis clearly support the conclusion that section 525(b) does not provide a cause of action against a private employer for its failure to hire an applicant who is or has been a bankrupt or a debtor. *See Fiorani*, 192 B. R.

at 405. Additional authority also supports this conclusion. Relying largely on the same textual argument advanced here by Capital One, courts have held that the bankruptcy statute does not impose liability on private employers for refusing to hire persons who have filed for bankruptcy. *See, e.g., Fiorani,* 192 B. R. at 404-05; *Pastore,* 186 B. R. at 554; *In re Madison Madison Int'l of Ill.,* 77 B. R. 678, 680-81 (Bankr. E.D. Wis. 1987).

The cases concluding that liability may be extended where there is no employer-employee relationship may be readily explained away or distinguished. First, the decisions do not address whether the failure to hire a bankrupt or debtor violates section 525(b). Second, in applying section 525(b) to credit unions who did not offer certain loan opportunities to members who were or had been bankrupts or debtors, the decisions rely on a committee statement issued in 1978 with the enactment of section 525(a). *See In re Patterson,* 125 B. R. 40, 53 (Bankr. N.D. Ala. 1990), *aff'd,* 967 F.2d 505 (11th Cir. 1992) (applying section 525(b) to debtor's credit union); *In re Callender,* 99 B. R. 378, 380 (Bankr. S.D. Ohio 1989) (same). These decisions do not provide an explanation as to why a congressional statement with respect to one bill can be properly used to interpret a different provision passed six years later. These decisions, therefore, are not persuasive.

Applying the above analysis, Burnette's first Complaint dated November 17, 1997 does not state a cause of action. Her second Complaint dated June 16, 1998, appears to allege that Signet Bank took steps to have her temporary assignment terminated as a result of its knowledge of Burnette's credit history. At least one court had held that a temporary employee can maintain an action

under 11 U.S.C. § 525(b) against a private employer if she can show the defendant was her real "employer," as evidenced by the defendant's right to control the plaintiff's work. *See Fiorani*, 192 B. R. at 408-09 (citing *Spirides v. Reinhardt*, 613 F.2d 826 (D.C. Cir. 1979)). In addition to the right to control, other factors cited by the *Spirides* court are the following:

> (1) the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision; (2) the skill required in the particular occupation; (3) whether "employer" or the individual in question furnishes the equipment used and the place of work; (4) the length of time during which the individual has worked; (5) the method of payment; (6) the manner in which the work relationship terminated, i.e. by one or both parties, with or without notice and explanation; (7) whether annual leave is afforded; (8) whether the work is an integral part of the business of the "employer"; (9) whether the worker accumulates retirement benefits; (10) whether the "employer" pays social security taxes; and (11) the intention of the parties.

Id. at 408-09. The district court below found that Burnette failed to provide any facts which would allow the Court to even consider the factors set out in *Spirides*.

CONCLUSION

For the foregoing reasons, Capital One Bank and Tom A. Broadhead respectfully request that the Court deny Burnette's Petition for Writ of Certiorari.

Respectfully submitted,

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